IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1624 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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LALITKUMAR D THAKKAR - Petitioner(s)
Versus
CONTROLLING AUTHORITY & ASSTT.LABOUR COMMISSIONER & 2 - Respondent(s)

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Appearance :
MR MUKUL SINHA With MR R.P. MANKAD for Petitioner.
MR LB DABHI, AGP for Respondent Nos. 1 & 2.
MR NAIK FOR M/S TRIVEDI & GUPTA for Respondent No.3.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 18/11/2005

ORAL JUDGMENT

1.The petitioner has filed this petition under Article 227 of the Constitution of India praying for quashing and setting aside the order passed by the Payment of Gratuity Authority on 24.10.1997 and the order passed by the Appellate Authority under the Payment of Gratuity on 28.10.1998.

2.This Court has admitted the petition and rule was issued on 25.10.1999.

3.The case of the petitioner was that the petitioner had joined the respondent No. 3 Factory in the year 1962 and left the said organization on 31.07.1995 by tendering his resignation. The petitioner was employed as Works Manager of a factory at Surat owned by

the respondent Company, registered office of which is at Bombay. The petitioner has applied for gratuity vide his application dated 02.09.1995. Since the respondent Company has not taken any concrete action except for giving assurances, the petitioner has preferred an application dated 25.02.1997 before the Controlling Authority under the Payment of Gratuity Act, 1972. After hearing the parties, the Controlling Authority has rejected the application of the petitioner on the ground that (i) it has no jurisdiction, (ii) the petitioner is not an employee and (iii) that the petitioner has not put in 5 years of continuous service.

4.Being aggrieved by the said order of the Controlling Authority, the petitioner preferred an appeal before the Appellate Authority under the Payment of Gratuity Act vide his appeal dated 24.12.1997 and after hearing the parties,

the Appellate Authority rejected the appeal on the ground that the petitioner was not an employee.

5.Being aggrieved by the said order of the Appellate Authority, the present petitioner has filed this petition invoking the writ jurisdiction of this Court under Article 227 of the Constitution of India seeking declaration from the Court that the orders passed by the authorities below are wholly erroneous, invalid and contrary to law and, therefore, the said orders deserve to be quashed and set aside. The petitioner has also sought for the declaration from this Court that the petitioner is entitled to the full amount of gratuity along with stipulated interest on the amount for the whole period from 01.08.1999 onwards till the gratuity is fully paid.

6.Before the arguments are started, Mr. Naik,

learned advocate appearing for the respondent Company has rightly conceded that he is not pressing the ground regarding jurisdiction and hence, the petition is merely concerned with other two grounds on which the petitioner's application was rejected by the Controlling Authority.

7.Mr. Rajesh P. Mankad, learned advocate appearing with Dr. Mukul Sinha for the petitioner has submitted that the Controlling Authority has committed an apparent error of law by holding that the petitioner does not fall within the definition of an employee but that he falls within the definition of employer. The Controlling Authority has completely overlooked the fact that the definition of the employee was amended by the Amending Act 34 of 1994 which came into effect on 24.05.1994 whereby the ceiling of the salary in the definition of employee was wholly

omitted and further that by the amending Act 25 of 1984 which came into effect from 01.07.1984, the definition of employee had been modified to include that any person who is employed in a managerial or administrative capacity would also be included within the definition of employee. Mr. Mankad has, therefore, submitted that the impact of 1984 amendment read with the 1994 amendment would be that every employee whether is employed in a managerial or administrative capacity without any limit of amount of wage earned by the employee would become entitled to the benefits under the Payment of Gratuity Act. He has further submitted that the Controlling Authority, however, made an indigenous interpretation of the word “employer” to deprive the petitioner being included within the meaning of “employee” and held that as the petitioner was the works manager and in-charge of the factory at Surat, he would be an employer and not an employee.

He has, therefore, submitted that while interpreting these two definitions under the Payment of Gratuity Act, it has to be borne in mind that while applying any of the two definitions to any person, the ingredients as included under the definition of the word employee should firstly be examined and in the instant case, the petitioner was admittedly a salaried employee being in the over all charge of the affairs of the factory or the business carried out by the Company. Thus, the petitioner squarely fell within the expanded definition of the word employee as modified by the two amendments mentioned above.

8.It is a well settled position in law that while interpreting the statute for welfare legislation, the interpretation should be so made so as to advance the object of the legislation and not to truncate the same. When the legislature in its right wisdom omitted the

ceiling of the salary from the definition of employee and also included the managerial functionaries within the definition, the objective of the Payment of Gratuity Act was to include within its beneficial sweep every salaried employee irrespective of the amount of salary drawn and irrespective of the capacity in which he was employed except those who were in the ultimate control of the affairs of the factory or the Company. He has further submitted that the Company being a private Company, the Chairman and the Managing Director would be the persons who would be ultimately in control of the affairs of the factory and the business of the Company and would, therefore, be the employer in the instant case. He has further submitted that the Controlling Authority has wholly misdirected itself in switching on the definition of employer to deny the petitioner of being included in the definition of employee. He has, therefore,

submitted that the decision of the Controlling Authority in this regard is wholly irrational and contrary to law.

9.Mr. Mankad has further submitted that the Controlling Authority has once again misdirected itself in holding that the petitioner herein has not completed five years of continuous service. In fact, while coming to this conclusion, the Controlling Authority falls back on the amendment of 1994 whereby the ceiling of salary was omitted from the definition of “employee” and adopts the convoluted logic that the petitioner has not completed five years from 1994 when the amendment came into effect. While making the amendment in 1994, the legislature has not changed the definition of continuous service as defined under Section 2A of the Act, which includes “every uninterrupted service including the service rendered before the commencement of

the Act". Thus, the entire service of the employee was to be taken into account i.e. from 1962 but by making the unusual interpretation of the amendment of 1994, the Controlling Authority came to a wholly erroneous conclusion that the petitioner has not completed five years of continuous service.

10.Mr. Mankad has further submitted that the Appellate Authority has also committed an error while holding that the petitioner is an employer and not an employee. The learned Appellate Authority has not given any reasons as to how he has come to such a conclusion and it is also obvious that the Appellate Authority has not applied its mind at all to any of the grounds set out by the petitioner in his memo of appeal. The order of the Appellate Authority is, therefore, wholly erroneous, smacks of non-application of mind and contrary to law and, therefore, be quashed and set

aside.

11.In support of his submissions, Mr. Mankad has relied on the decision of this Court in the case of *Monitron Securities Private Limited V/s. Mukundlal Khushalchand Dhavan, 2001 (1) G.L.H. 639* wherein this Court has taken the view that on appreciation of facts, both the Authorities have found that a mere designation of "Director" was given to the respondent and he was not having any control over the Management of the Company and all the controls were with the Managing Director of the Company. The Court has further taken the view that it is not in dispute that the petitioner had never acted as a Managing Director and all the administrative decisions were in the hands of the management and, therefore, simply because he signed some papers as Director, that will not dis-entitle him from availing of the benefits of gratuity under the Payment of

Gratuity Act. The Court further took the view in that matter that the petitioner cannot be said to be an employer/co-employer, as, even looking to the definition of 'employer', if any person is having ultimate control of the affairs of the Company, he can be considered as employer. The petitioner was not having any such control in his hands and after considering the evidence on record, the authorities have come to the conclusion that the respondent was not having any such control and accordingly, the petitioner was entitled to benefit of gratuity under the Payment of Gratuity Act, 1972 as an employee of the Company.

12.Mr. Mankad has further relied on the decision of the Hon'ble Supreme Court in the case of *J.K. Industries Limited and others V/s. Chief Inspector of Factories and Boilers and others, (1996) 6 S.C.C. 665* wherein the Hon'ble Supreme Court has observed while dealing with the word

"occupier of a factory", that the occupier of a factory owned by a Company will be any one of the Directors of the Company who has been notified / identified by the Company who have ultimate control over the affairs of the Company and whether no such Director has been identified then for the purpose of prosecution under the Act. The proceedings against any one Director as deemed occupier.

13.The word "ultimate" has also come up for consideration before the Hon'ble Supreme Court in the case of *Indian Oil Corporation Limited V/s. Chief Inspector of Factories and others, (1998) 5 S.C.C. 738* wherein it is held that for the purpose of Section 2(n) of the Factories Act what is to be seen is who has the "ultimate control" over the affairs of the factory. Relevant provisions regarding establishment of the Corporation and its working leave no doubt that the ultimate control over all the affairs

of the Corporation, including opening and running of factories, is with the Central Government. Acting through the Corporation is only a method employed by the Central Government for running its petroleum industry. In the context of Section 2(n), it will have to be held that all the activities of the Corporation are really carried on by the Central Government with a corporate mask.

14.Based on the aforesaid legal position and looking to the facts, Mr. Mankad has submitted that the orders passed by both the authorities below are contrary to the provisions of the Act and against the settled legal propositions and hence, the said orders are required to be quashed and set aside and the petitioner may be awarded Gratuity under the Payment of Gratuity Act with interest as statutorily prescribed.

15.Mr. Naik, learned advocate appearing for the

respondent No. 3, on the other hand, has submitted that both the authorities have taken concurrent view which cannot be disturbed while exercising the powers under Article 227 of the Constitution of India. Both the authorities have found as a matter of fact that the petitioner was doing managerial functions and he was having the ultimate control. He was signing all the papers, he was making payment of gratuity to other workers, was filing necessary forms before all other authorities and under him, more than 300 workers were working and he was in exclusive charge of the factory at Surat. In this view of the matter, it cannot be said that the petitioner was not an employer. Mr. Naik has tried to distinguish the decisions relied on by the petitioner on the ground that in the case of Minotron Securities Pvt. Ltd. (Supra), the authorities have found as a matter of fact that mere nomenclature is not enough. He was appointed

as the Director subsequently and initially, he was working as a Manager and in that view of the matter, the Court has taken the view. Here in the present case, so far as the factory is concerned, the petitioner was having the ultimate control and hence, he squarely falls within the definition of the employer as provided under Section 2A of the Payment of Gratuity Act. He has, therefore, submitted that the authorities below have taken the correct decision which cannot be interfered with by this Court under Article 227 of the Constitution of India.

16.After having heard learned advocates appearing for the respective parties and after having gone through the relevant statutory rules and the law laid down by the Court on this issue, the Court is of the view that by no stretch of imagination, it can be said that the present petitioner is having ultimate control over the

affairs of the Company. It is true that he was put in charge of the factory at Surat. However, he is answerable to the Managing Director as well as to the Chairman as well as to the Board of Directors. He has no power to take the policy decision with regard to payment of gratuity to any person. All these powers are vested with the Board of Directors. It is also on record that the petitioner was working as a Works Manager and the managerial function is squarely covered within the definition of an employee as given in Section 2(e) of the Act. The very fact that Act was amended twice, firstly in 1984 and secondly in 1994 which makes it clear that the whole object of amending the Act was to enlarge the scope of payment of gratuity to the employees. When the legislative intention is very clear, the Court should restrain itself from restricting the said scope. The Court is, therefore, of the view that both the authorities below have

committed an error in not granting the benefit which the petitioner was otherwise entitled to. The Court, therefore, quashes both the orders passed by the Controlling Authority as well as Appellate Authority and declares that the petitioner is entitled to the payment of gratuity.

17.So far as interest is concerned, Section 7(3A) talks about interest. Mr. Mankad has relied on the decision of the Hon'ble Supreme Court in the case of *H. Gangahanume Gowda V/s. Karnataka Agro Industries Corporation Limited, (2003) L.L.J. 1119* wherein it is held that Section 7(3-A) introduced by amendment in 1987 gives clear command mandating the employer to pay gratuity within the specified time and to pay interest on its delayed payment. No discretion was available to exempt or relieve the employer from payment of interest to the employee on belated payment of gratuity. The Court in that

case directed the respondent to pay interest @ 10% on the amount of gratuity to which the said employee was entitled from the date it became payable till the date of payment of the gratuity amount. Following the above decision of the Hon'ble Supreme Court, the Court hereby directs the respondent No. 3 to pay interest @ 10% on the amount of gratuity to which the petitioner is entitled from the date it became payable till the date of payment of the gratuity amount.

18. Subject to the aforesaid directions and observations, this petition is accordingly allowed and rule is made absolute to the above extent without any order as to costs.

[K.A. PUJ, J.]

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